Criminal Aspects of Medical Errors

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Abstract

In this paper, we focus on the importance and role of criminal law in sanctioning medical errors. Bearing in mind that criminal acts are the result of irresponsible, inappropriate or insufficiently careful behaviour of medical staff during the treatment, there are difficulties in proving them in criminal proceedings. Due to the complex causality and sensitiveness of this problem, there is a need for a detailed analysis of the relevant provisions of the Serbian Criminal Code. In this regard, our goal is a comprehensive review and assessment of the quality and efficiency of current legislative solutions. The court practice in the matter was also the subject of the analyses, so we tried to identify points of disagreement in the court's interpretation of legal provisions. Subjective elements of the legal definition of the basic form of the offence are particularly examined. We concluded the paper with recommendations for the improvement of legal solutions *de lege ferenda*.

Keywords: doctor, forensic expertise, medic, medical treatment, unnecessary surgery

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Criminal Aspects of Medical Errors

The proving of relevant facts in court proceedings becomes exceedingly hard when it comes to medical errors. Medical errors could result in civil or criminal liability of medical staff (Bryden & Story, 2011, p. 124). The issues of criminal liability of medical doctors always raise numerous ethical and legal questions. (Meng, 1997, p. 86). Practising the medical profession is a highly responsible task, which requires great professional knowledge and experience, as well as ethical qualities. On the other hand, the complexity and number of factors (external and internal) that affect a person's health condition, complicate the problem of determining causality (On causality: Živanović, 1922). Also, the fact that, during the court expertise, medical collegiality and solidarity often come to the fore, calls into question the objectivity and impartiality of the decisions based on such expertise (Ćirić & Pajtić, 2019, p. 213). As a consequence, the number of criminally convicted medical doctors is relatively small in the past few decades (Ćirić, 1991). However, an increase in criminal proceedings against doctors in recent years is evident. (Savić, 2019, pp. 259–260). There is an interesting fact: "in the expertise of the Institute of Forensic Medicine in Belgrade, in recent years, the largest number of cases in which forensic expertise is performed in criminal proceedings due to negligent provision of medical care was related to the work of anesthesiologists, obstetricians, and surgeons" (Savić, 2019, 260; Savić, 2010; Savić, 2016).

But one should also bear in mind that, like in any other profession, medical errors are sometimes inevitable. Not every medical error has the quality of a criminal act and imposing criminal sanctions is legitimate only when it is used as an ultima ratio (Savić, 2019, p. 261).

In this paper, we are analysing the provisions of the Criminal Code of the Republica of Serbia [CC] (2005) and the relevant court practice, to provide an objective assessment of the quality and adequacy of adopted legal solutions. Our analysis is predominantly based on the review of legal provisions, not on determining the medical facts. Having that in mind, we will present Article 251 of the CC and consider possible interpretations of its certain elements. Then, we shall focus on qualified forms within Article 259.

Finally, we will recommend some amendments and changes to enhance current legislation.

The Offense Under Article 251 of the Serbian Criminal Code

The crime stipulated under Article 251 regulates an overly sensitive matter. It incriminates medical errors that resulted in deterioration of health or, in the case of severe forms, severe impairment of health or death of the patient.

The Basic Form of the Offense

The basic form of this crime is present when a doctor "applies an obviously unsuitable means or obviously unsuitable method of treatment or does not apply appropriate hygienic measures or acts obviously unscrupulously and thus causes deterioration of a person's health". The proscribed punishment is imprisonment from three months to three years.

The actus reus of the crime consist of four alternative actions:

- use of an obviously unsuitable means.
- application of obviously inappropriate treatment.
- non-application of hygienic measures.
- obvious conscienceless.

The actus reus of the crime will exist when one out of four mentioned actions is performed. One of the four alternative actus reus needs to have the quality to be determined as the specific cause of the consequences of the crime – the deterioration of the health condition of the passive subject.

The *mens rea* needed for the basic form of the offence is the intent. If the doctor acted out of negligence, the act will be qualified by paragraph 3 of the same Article (a privileged form of the offence). However, one should bear in mind that the perpetrator's intent is always eventual, not direct. The doctor is aware that he is applying obviously inappropriate ways or means of treatment that could lead to a forbidden consequence, and he only agrees to that. If the intent was direct, it would be another crime, depending on the consequences that occurred (Stojanović & Perić, 2011, p.

201). For example, if a physician knowingly and willingly, with the intent to worsen a patient's health, apply an obviously inappropriate treatment, it would be criminally qualified as an attempted grievous bodily injury or murder, depending on the circumstances.

Some authors argue that it is almost impossible to prove *dolus eventualis* in a criminal proceeding and that in most cases perpetrators of this offence act out of negligence (Savić, 2019, p. 264; Stepić, 2009, p. 196). Indeed, this is a tricky issue. The legal definition of *dolus eventualis* in CC is narrow. *Dolus eventualis* is more than recklessness and less than intent. Article 25 of CC acknowledges *dolus eventualis* only when the perpetrator agrees to the act, including its consequence. It is exceedingly hard to prove that medical doctors agreed to consequences in these cases. The negligence will be far more frequent in practice.

The key to determining the existence of this offence lies in the question of whether the doctor acted *lege artis* (according to the rules of the medical profession). Therefore, the findings and opinions of experts of the appropriate medical speciality in criminal proceedings are of paramount importance in proving the criminal act. The rules of the profession produce certain standards of conduct, which change over the years, in accordance with new scientific knowledge and practice. Physicians are required to apply methods and standards of treatment that ensure the use of appropriate methods of diagnosis and treatment (Srzentić et al, 1986, p. 410).

Deviation from the rules of the medical profession is certainly a disciplinary (Labor law) violation, and often an ethical one, too. For this conscious and voluntary deviation to become a criminal offence, certain criteria need to be fulfilled. Criminal protection is the ultima ratio and its application is subsidiary in relation to other branches of law, i.e., it is reserved only for cases of socially dangerous violations of the rules of the medical profession (Stojanović & Perić, 2011, p. 198).

The first condition is that the doctor has significantly deviated from the rules of diagnosing and treating the patient when performing any type of medical activity (from surgery to vaccination, taking blood samples, or examinations in outpatient settings). Regardless of whether the goal of

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providing medical assistance was treatment or, for example, a change in appearance during aesthetic surgery, or examination of health parameters, this condition is met when action is taken within the medical profession. Thus, the term treatment is interpreted extensively (Srzentić et al., 1986, p. 411; Stojanović & Perić, 2011, p. 200). The significant deviation is reflected in the application of obviously unsuitable means or methods, as shown above, as well as non-application of hygienic measures, i.e., other obviously unscrupulous treatment. Therefore, a conspicuous, obvious, and serious violation of the medical profession rules is required (Stojanović, Perić, 2011, p. 199; Stojanović, 2018; Delić, 2021).

Examples of an obviously unsuitable mean would be non-indicated drugs; incorrect dosage of the drug (for example, the paediatrician prescribes the child a much higher dose of the drug than recommended for his age – 10 instead of 5 ml); radiation overdoses; blood transfusion of inappropriate blood group, etc. (Srzentić et al., 1986, p. 411).

Obviously, inappropriate treatment would include, for example, unnecessary surgery; contraindicated physical therapy, etc. Non-taking of hygienic measures refers to general and specific measures which ensure complete sterility of instruments and performing of appropriate disinfection and cleaning (Stojanović & Perić, 2011, p. 199). Examples of obvious conscienceless are numerous and may include various actions, such as failing to undertake diagnostic procedures – X-rays, scanners, or ultrasounds; ECG or EEG examination, biochemical analysis; blood pressure measurement; determination of allergic hypersensitivity to the components of the drug or other applied agent, etc. (Srzentić et al., 1986, p. 412). For example, a patient comes to the emergency department of the clinical centre due to nausea and abdominal pain, as well as shortness of breath, but the attending physician discharges him without an ultrasound and ECG examination, explaining that he probably "consumed heavy food", after which the patient dies from the consequences of a heart attack that took place when he sought help.

One court decision is very illustrative: “the doctor did not take the necessary medical measures to make a correct diagnosis, i.e., did not perform further laboratory tests on the patient, nor did observe the patient... with a

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serial repetition of ECG at intervals of the half to one hour for several hours... and he obviously acted unscrupulously and thus caused a deterioration in the health of the now-deceased PP" (Presuda ASB, Kž1 721/14).

Obvious conscienceless is usually associated with failures caused by the superficial and unprofessional approach of the doctor, although it can also refer to active actions, such as performing a risky examination despite the existence of contraindications (e.g., a specific procedure that could endanger the heart or certain blood vessels is performed without blood pressure control, although the patient had a history of blood pressure problems). Court practice explains the meaning of the term "obvious": "it should be understood as gross neglect of medical duty, i.e., as a conspicuous mistake of a doctor who grossly violates the rules of the medical profession and science" (Rešenje ASK, Kž1 1356/2016).

Another condition for the existence of this crime is the occurrence of a consequence. Given the threatened punishment, the attempt of the offence is not punishable (Vuković, 2021; Stojanović, 2018; Lazarević, 2011), so the non-occurrence of the consequence excludes the existence of a criminal act. This means that if the doctor acted obviously unscrupulously and the health condition did not worsen, there will be no criminal offence.

The perpetrator of the offence under Article 251 paragraph 1 is the medical doctor. (Stepić, 2009, p. 194). However, the court states that a doctor of dental medicine can also be considered a perpetrator of this offence (Rešenje OSB, Kž. 553/09; Rešenje DOSB, K. 1156/08; same conclusion: Savić, 2019, p. 261). It is interesting that Article 181 of the Croatian Criminal Code explicitly mentions dental medicine doctors as the perpetrators of this crime (Kazneni zakon Republike Hrvatske, 2011). Criminal codes of Slovenia, Montenegro, and Republika Srpska have solutions similar to the Serbian Criminal Code (Kazenski zakonik Slovenije, 2012; Krivični zakonik Crne Gore, 2003; Krivični zakonik Republike Srpske, 2017). It is important to mention that all the states of former Yugoslavia have this offence in their criminal legislation (Stepić, 2009, p. 191).

The next important question is the circle of passive subjects (victims) of the crime under Article 251. Every born person up to his death can be the

passive subject of the offence. But, in court practice, one prominent issue occurred. Can an unborn child be the victim of this crime? One relatively recent court decision clearly states that the child has legal subjectivity from the start of birth: "having in mind the modern views of relevant sciences, from which it follows that the fetus – the unborn child received criminal protection from the moment of birth and has since been considered the holder of the right to life..., one can further conclude that the fetus acquires the status of the subject of this fundamental right, from the beginning of childbirth, which occurs with the onset of the first contractions and labour pains that naturally lead to childbirth, although that the child is not yet separated from the mother's womb" (Rešenje Apelacionog suda u Beogradu, 2015).

However, courts had different standing about the death of a fetus inside the mother's womb, in cases when it could live outside the uterus, but the childbirth hasn't started. The stand of the Court of Appeal in Kragujevac has well explained: "death of a fetus from a pregnant woman, who has reached such a level of development that he is capable of extrauterine life, and which occurred due to the commission of the criminal offence of negligent provision of medical assistance under Art. 251. para. 3. in connection with para. 1. of the Criminal Code, does not represent a consequence in the form of the death of one or more persons as a feature of the crime of serious crime against human health under Art. 259. para. 4. CC". (Presuda ASK, Kž1 657/2019). At the session of the Supreme Court of Cassation, the conclusion was in line with the verdict of the Kragujevac Court of Appeals. (Zaključak, 2018). The practice of the European Court of Human Rights also confirms this conclusion (Ćirić pandemic. The so-called collision of duties in the situation when a hospital does not have enough medical resources (e.g., respirators) and medical doctors must choose between two or more endangered patients, is a matter of theoretical discussions, while valid and universal medical criteria and standards for proper conduct are still absent (Vuković, 2020, pp. 142–143).

Although it is not the subject of this paper, it is also worth noting that important theoretical questions arise when it comes & Pajtić, 2019, p. 222).

Finally, intriguing issues for Criminal Law theory arose during the Covid-19

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to patients' consent as a ground for justification of crime in medical interventions (Vuković, 2013; Čejović, 1967; Đorđević, 1963).

Particular, privileged, and qualified forms of the offence

A particular form of criminal offence is provided in paragraph 2 of Article 251. It exists when "another healthcare employee acts obviously conscienceless in providing medical assistance or care or in performing other healthcare activities which leads to consequences in the form of deterioration of the patient's health. The responsibility of other medical staff is, at first glance, lower than that of doctors, who make decisions about both diagnosing and implementing therapy. But other health professionals, who follow the doctor's orders and act on their own to care for or help the patient, can also cause severe consequences by their conscienceless behaviour. Therefore, the legislator introduced a particular form of the crime, for which he proscribed identical punishment as for the basic one.

This solution is legitimate, given the role of medical staff and their contact with patients, which, especially in hospital conditions, is often more intense or more frequent than contact between doctors and patients. Given that both nurses (technicians) and other staff are in a position to significantly influence the outcome of treatment through conscientious or opposite behaviour, they should be liable for the consequences of misconduct. There are numerous examples of conscienceless treatment, especially when it comes to performing hygienic measures or taking procedures such as vaccination, browning, blood sampling, hospitalization, raising and lowering patients, massage, and other physical therapy techniques, etc. This conclusion is undisputed in court practice: “medical care also includes bathing the baby in the pediatric centre by a nurse”. (Presuda OSB, Kž. 3517/06; Presuda POSB, K. 2004/03).

The privileged form of the offence has all the elements of the basic one except for the intent. It will be present when the perpetrator performs actus reus out of negligence. A proscribed sentence is a prison up to 1 year or a fine. This form of negligence is called professional negligence. (Pandit & Pandit, 2009).

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Aggravated (qualified) forms of the offence are stipulated in Article 259. The title of this Article is "Serious acts against human health". It encompasses qualified forms of certain crimes from this chapter of the Criminal Code, including this crime. Thus, imprisonment for one to eight years is envisaged if due to the actus reus from Article 251 para. 1 or 2, there was a severe bodily injury or severe impairment of the patient's health. If the consequence of the actus reus was death, the proscribed sentence is from two to twelve years in prison.

This article also envisages a qualified form of the act referred to in paragraph 3 of Article 251. If the serious consequence was a serious impairment of health or a serious bodily injury, the penalty is up to three years in prison; while in the event of death, a sentence of one to eight years in prison is envisaged.

In the first two cases (the acts referred to in paragraphs 1 and 2), the basic form of the offence was committed with intent, while the consequence is the result of conscious or unconscious negligence of the perpetrator (Počuča et al., 2013, p. 210).

In the case of a more serious consequence of the act referred to in paragraph 3, the action itself and the more serious consequence are both the result of negligence. For example, due to poor heed, the doctor failed to enter the data on the patient's allergic sensitivity, because of which he received the medicine to which he is allergic, intramuscularly; and afterwards, there was a severe deterioration in health and death. In relation to both consequences (deterioration of health and death), the doctor here acts out of negligence.

All forms of a criminal offence under Article 251 (and its qualified forms under Article 259) are exceedingly difficult to prove in court practice. This particularly stands for the forms stipulated in Article 251 paragraph 1 or 2, because *dolus eventualis* as a form of *mens rea* cannot be easily proven.

Conclusion

Although current legislation generally provides a solid normative framework for criminal sanctioning of medical errors, there is room for certain improvement. First, the legal definition of a basic form of the offence could be

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more precise. In one court decision we mentioned, it was clearly stated that Dental Medicine Doctor can also be the perpetrator of this crime. But, the circle of potential perpetrators should be defined by the legislator, without leaving space for different interpretations (as in the Croatian Criminal Code).

Second, and maybe the most important remark, is related to the definition of consequence and element of guilt in the basic form. The causality in the case of medical errors is very complex. We believe that the current legal definition of the consequence, according to which the action of a doctor must be the direct cause of deteriorating health, unnecessarily (perhaps unfairly) complicates the criminal proceedings. Also, it is extremely hard to prove (and even to believe) that medical doctors agreed to the deterioration of the patient's health, in case of *dolus eventualis*. Having that in mind, we suggest the change of legal definition of the basic form (and consecutively, other forms). We believe the better formulation would be the following one: a doctor (or Dental Medicine Doctor) who applies an obviously unsuitable means or obviously unsuitable method of treatment or does not apply appropriate hygienic measures or acts obviously unscrupulously although he was aware or was obliged to be aware that it could lead to deteriorating of patient’s health, if the deterioration actually occurs, will be punished... Thus, the deterioration of health becomes an objective condition of incrimination instead of a consequence. The awareness of the possible worsening of a health condition becomes part of the guilt element. The offence would exist in the case of *dolus eventualis* or negligence, and the proscribed sentence should be much more flexible (the sentencing range should be wide enough so the courts could choose adequate sentences for different forms of guilt).

This model of formulating the subjective element is not common in our criminal law, but it seems more appropriate, considering the phenomenology of offence. If the legislator adopts this solution, a privileged form will cease to exist in a separate paragraph, because it would become part of the basic form of the offence.

It seems to us that the basis of liability lies primarily in the fact that the doctor deviated from the rules of the profession, although he was aware or, more often, was obliged to know (although he did not) that such a move

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could lead to a worsening of the patient's health. (Smith, 1996, p. 146). In other words, the basis of liability is in his psychological attitude towards the performed action and the severe failure to obey the professional standard of care. The focus of the legal definition should be put on the action and *mens rea* (especially professional negligence), not on the causality and the consequence. Of course, one has also to be aware of the challenges present when it comes to proving criminal negligence. (Greenberg, 2021). This, of course, does not mean that crime should exist without deterioration of health. That is supposed to become the objective condition of incrimination, as we concluded.

The third remark is about legislative technique. The particular form of the offence stipulated in paragraph 2 of Article 251 could be erased and joined to paragraph 1 of the same Article, with a slightly different formulation (etc. the doctor, dental medicine doctor, or other members of medical/dental staff).

Article 181 paragraph of the Croatian Criminal Code also introduces abortion as a qualifying circumstance. Although it could be argued that abortion is also considered a type of serious bodily injury, we believe that abortion, as a consequence, should be explicitly stated in our legislation, too. Also, our, as well as the Croatian incrimination, does not proscribe the damage to the fetus as a qualifying circumstance. We believe it would be legitimate to prescribe foetal damage (in the phase before the beginning of childbirth) as a qualifying circumstance. The justification for the criminalization of this consequence is evident because certain medical treatment or diagnostic methods sometimes lead to foetal damage. With proscribing foetal death and foetal damage as consequences of this crime, criminal protection would be more appropriate and certain dilemmas that are now present would vanish.

One should bear in mind that criminal repression against members of the medical profession that is too strict could be counterproductive. (Ćirić & Pajtić, 2019, pp. 225–226; Pandit & Pandit, 2009, p. 379; Smith, p. 131). A fair balance between the protection of patient rights and the consideration of the complexity and sensitivity of healthcare activities is needed. With recommended amendments, our legal framework, we believe, would be more efficient and fairer to the victims and society as a whole.

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Krivični aspekti medicinskih grešaka

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Sažetak

U ovom radu se fokusiramo na značaj i ulogu krivičnog prava u sankcionisanju lekarskih grešaka. Imajući u vidu da se krivična, dela koja proističu iz neodgovornog, nedoličnog ili nedovoljno pažljivog ponašanje lekara tokom obavljanja lečenj, postoje teškoće njihovog dokazivanja u krivičnom postupku. Zbog složene uzročnosti i osetljivosti problema, postoji potreba detaljnog analihziranja relevantnih odredbi Krivičnog zakonika Srbije. U vezi sa tim, naš cilj je sveobuhvatno sagledavanje i procena kvaliteta i efikasnosti aktuelnih zakonskih rešenja. Predmet analize je bila i sudska praksa po tom pitanju, te smo pokušali da ukažemo na tačke neslaganja u sudskom tumačenju zakonskih odredbi. Posebno su ispitani subjektivni elementi zakonske definicije osnovnog oblika krivičnog dela. Rad je zaključen preporukama za unapređenje zakonskih rešenja *de lege ferenda*.

Ključne reči: lekar, sudskomedicinsko veštačenje, medicinksi tretman, nesavesno lečenje, nesavesna operacija